

May 18, 2006

Municipal Stormwater Phase II Western Washington Comment
Washington State Department of Ecology
Water Quality Program
PO Box 47696
Olympia, WA 98504-7696

RE: City of Bothell Comments on the Draft Municipal Stormwater National Pollution
Discharge Elimination System General Permit for Western Washington Phase II Small
Municipal Separate Stormwater Sewer Systems

Dear Phase II Western Washington Comment Coordinator:

The City of Bothell has reviewed the Draft of the Phase II NPDES permit. The following comments have been generated from that review, attendance at the Washington State Department of Ecology (Ecology) sponsored meetings and meetings/discussions with stormwater managers across Puget Sound. The City shares many of the same concerns expressed by other Phase II jurisdictions. This permit as written obligates Phase II jurisdictions to spend time and money on actions that will not improve water quality in Puget Sound and subjects municipalities to unreasonable levels of liability for these actions. We believe that as written far more time and effort will be spent on paperwork and litigation than on improving the waters of Puget Sound.

The following items reflect our overall concerns with the permit as written

- The City thinks the permit places responsibilities that are correctly Ecology's onto the municipalities and with it the legal liabilities.
- The City believes there are unattainable requirements contained in the permit with very explicit and duplicative reporting requirements that will result in paperwork errors and fuel adversarial parties find to pursue litigation.
- The City is also concerned that this permit goes well beyond the 6+2 requirements that were required in the City's NOI and supported by the Phase II advisory group in 2003.

Monitoring

The City is alarmed that Ecology is transferring their responsibilities for assessing BMP effectiveness and receiving water trends onto local jurisdictions. Not only is it inappropriate for local jurisdictions to be forced to take on Ecology's responsibility and liability, jurisdiction by jurisdiction variations in monitoring protocol will ensure inefficient use of resources and result in data that is not regionally useful to adaptive management of the program.

Federal law directs the permit to cover municipal separate storm sewers owned and operated by the permittees, which does not include receiving waters or re-evaluation of approved best management practices (BMPs). The requirements in this permit cause the municipality to be responsible for discharges outside of the expectation of the federal law. Phase II and Phase I municipalities have presented Ecology with a monitoring alternative that Ecology has not adequately reviewed or addressed. The alternative wording addresses BMP evaluation and receiving water monitoring.

As stated in the City's previous comments on this permit, we request that Ecology form a Stormwater Partnership with Phase I and Phase II jurisdiction, environmental groups other interested stakeholders and Ecology staff from the Water Quality (NPDES) program Environmental Assessment program and a policy level staff that crosses internal program divisions. This on-going partnership will be responsible for:

1. Coordinating on a baseline and trend assessment monitoring strategy at the watershed level that would link and coordinate with salmon recovery and Puget Sound Initiative programs.
2. Develop monitoring language and replace existing monitoring language in phase I and II permits with language that reflects a monitoring program that would provide:
 - Meaningful management information for improving BMP selection and making other stormwater management decisions.
 - Reliable indicators that SWMP actions were making reasonable progress toward desired outcomes.
 - Coordination and analysis of information across jurisdiction and agencies through the partnership to reduce redundancies realize efficiencies and improve transparency.

Ecology has given verbal support to the idea of coordinated monitoring with an advisory board to oversee its development. The permit should address this process adequately and reflect it in the permit before the permit is issued.

Wastewater vs. Stormwater:

The section S4.A needs to have the references to wastewater regulations removed. The wording suggests that stormwater is regulated and was intended to be regulated as a point source with effluent limits. This is not the case. RCW 90.48.520 specifically refers to wastewater which is subject to using All Known and Reasonable Treatments (AKART) and has associated effluent limits, whereas stormwater is regulated by programmatic activities to the Maximum Extent Possible (MEP). S4.A should be deleted. The reference to AKART in S4.D and S4F.2 should be deleted as well since MEP rather than AKART is the appropriate compliance standard. Bellevue and King County's have extensive notes on this issue that the City of Bothell concurs with.

Review and Approval of required documents

The city is concerned with the lack of staff to evaluate required elements of the programs such as manuals, protocols, quality assurance plans and the SWMPP itself. Cost benefit, sampling, educational effectiveness for cost, appropriate codes and enforcement, complete SWMP, manual review for surface water and illicit discharge detection and elimination.

Phase II permittees are paying for coverage under this permit. We do not have coverage if the Department of Ecology has not reviewed and approved the documents required to be developed and/or submitted under the permit. In effect Ecology has shifted their liabilities onto local jurisdictions and then failed to provide adequate coverage to those jurisdictions in the form of review and documented approval of each permittees required program elements. The Department of Ecology should define compliance in a way that is clearly attainable and only require documents from jurisdictions if they can guarantee staff will review and approve them.

Reporting

Reporting requirements should be limited to documents that Ecology will review and summarize with other jurisdiction's information to provide Phase II permittees with adaptive management options. Any reporting requirement that adds costs but will not be reviewed by Ecology **and** does not contribute directly to the regional knowledge base needed to improve water quality should be removed. The map submittal requirements and the cost tracking reports are examples of requirements that should be removed.

Although we understand the intent of the cost tracking, we do not believe it will serve the purpose it was intended to serve. As with individual sampling methods, fiscal tracking varies, activities are given different titles, and the activities united under similar titles varies. We do not believe this is a valuable way to do a cost benefit or effectiveness evaluation. It would be far more valuable to spend additional time and effort documenting the outcomes the permit is indented to affect.

An outcome that meets the standards could then be evaluated for cost effectiveness. In that way the state could determine if it was really MEP for all jurisdictions, before making it a requirement.

Manual Adoption

Sections of the Ecology Stormwater Management Manual for Western Washington are included in this permit in a manner that requires permittees to refer to the entire manual. The manual is to be used for guidance only, having never gone through public review and a cost benefit analysis. Therefore the references Ecology chose to include in the permit should be specific references to an individual practice or standard that may or should be applied. These references should be cleared of further references that incorporate large portions of the manual that are not included as an Appendix. No references should be left in that refer to any document or portion of a document that isn't in the appendices.

Pre-Forested Condition

This issue is reiterated from the comments on the first draft. Although the wording has been changed in the permit, the reference to Appendix 1 still requires forested conditions and still creates the following problems. The requirement to mitigate redevelopment to forested conditions creates a "taking" concern. This is clarified in the letter to the Department of Ecology from the Association of Washington Cities. This condition adds an additional cost burden on developers which in turn creates a barrier to development under GMA. Redevelopment will require greater retention and improved water quality facilities. If more stringent requirements need to be placed on a particular site to rectify an existing flooding or water quality issue the City has the ability to implement said requirements. This significant disincentive to redevelopment and concentration of growth in urban areas should be removed from the permit. This issue is before the Attorney General at this time and should be resolved before this permit is issued.

The Definition of Illicit Discharge

The term "Discharge" is defined on page 44, line 37-38, "for the purpose of this permit means, unless indicated otherwise, any discharge from a MS4 owned or operated by the permittee." The definition of Illicit Discharge as found on page 45, lines 24-27 should be changed to be consistent with the definition of discharge. This committee recommends that "Illicit discharge" means any discharge to a municipal separate storm sewer from a MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit; other than the NPDES permit for discharges from the municipal separate storm sewer and discharges resulting from fire fighting activities.

General

The City is very concerned about the Clean Water Acts stipulation that once we begin an action we cannot do less. The Phase II permit contains regulatory requirements that are not possible for a MS4 to attain and yet once in the permit we will be unable to remove that requirement from the permit because of the Clean Water Act's "no backsliding clause". I strongly urge Ecology to practice adaptive management by develop a permit with attainable goal which can be changed if the outcomes are not adequate. Related to this concern is the requirement to track our budget. The expectation that we can not spend less money than our first year even if the activity is complete and a success is an untenable condition.

Comments on the Appendices

Appendix 2 - TMDL North Creek:

The adaptive management requirement should have limits. Ecology should commit to doing a cost benefit analysis to evaluate the success of the required BMPs before requiring additional BMPs. All additional BMPs should be evaluated for effectiveness by Ecology before their implementation is required. This should be clearly stated in the TMDL requirements.

Ecology needs to spell out when they will begin a Use Attainability Analysis so that municipalities have assurances that they will not be out of compliance with permit requirement for a condition that can't be met.

The strong suggestion to sample storm water and calculate loading should be removed. Unless the standards are specifically based on loading, it is an unnecessary expense that does not provide municipalities information that is useful in meeting standards.

Sampling at receiving waters should be very limited. It should be ambient long term and coordinated throughout municipalities so that a minimum of sites can be sampled.

- Action Items #1 and #2

The TMDL requires ordinances that are equivalent to the Ecology Manual. The TMDL should not refer to the manual. All requirements should be included in this section of the TMDL.

- Action Item #5

Small municipalities should not be required to do research for the state. Ecology should investigate potential BMPs or fund grants to support an investigation and use the results to either approve or disapprove the BMP.

Action Item #6

The North Creek Watershed Management Plan is over a decade old. So much has changed in the watershed since the development of that document that it should not be

referred to in the TMDL. If there are specific recommendations that Ecology feels are still appropriate they should be written into the TMDL.

The requirement to evaluate critical area ordinance is too general. Provide specific reasons why municipalities should evaluate this and how they should evaluate it. Such as this area has sheet flow, this area doesn't, this many feet of buffer are needed for to filter x amount of water. It is very unclear as written.

Appendix 3 – Reporting:

Phase II jurisdictions have been told that there will not be adequate staff to review our manuals, programs, QAPPs. We are concerned that Appendix 3 is a reactive and punitive way to manage the permit process. Ecology staff will be allocated to determine compliance, document implementation, evaluate results and add requirement (continual improvement) determine audit candidate and share information rather than review and approve programs as they are developed.. Several of these tasks could addressed in a positive cooperative way through partnerships such as the proposal the monitoring committee presented rather than this post activity check and audit method.

Overall the reporting is excessive and appears to be written in a manner designed and catch municipalities in paperwork errors that will contribute to litigation rather than advancements in water quality. Ecology verbally committed to simplifying the reporting and this is not simplified. Please number the reporting requirements for easier reference. The City's comments will use numbers to simplify tracking.

- Number 1: This should be deleted. The form! Annual Report From for Western WA Phase II Cities, Towne and counties is the entire permit and is a SWMP reporting. Municipalities should not be required to report the same information twice.
- Number 2: Cost tracking should be eliminated as something that provides no water quality improvements.
- Number 4: As per comments on the body of the permit. Audiences change, people move, there is no adequate way to measure an increase. Number of people reached can be counted.
- Numbers 7 and 12 are the same essentially. Combine them to avoid useless repetition.
- Numbers 14 and 15 are the same. Combine them to avoid useless repetition.
- Numbers 16, 17 and 18 should no longer require reporting once developed.
- Number 19 even says combine with something else. Eliminate this and combine it so the municipalities don't have a paperwork error of non compliance trying to figure this out.

- Number 22 and 23 and 32 combine them. No sense in this duplication.
- Number 37 Requiring dates is not a summary, it is a giant list. This should not be a requirement. Total # total cleaned.
- Numbers 38-41 are all the SWMPP which was required as a separate document and then required in Number 1 and now required here. Place this requirement in one place. If you want to list this all out fine – then just have one number under which it will all be reported in one place.
- Number 42-44 should be rewritten to reflect Ecology oversight and joint efforts in a coordinated monitoring program.

Thank you for the opportunity to comment on this draft permit. The City sincerely hopes that their comments will improve the outcomes expected by the employment of this permit process.

Sincerely,



Douglas Jacobson, P.E.
Public Works Director

cc: Robert Stowe, City Manager
Eddie Low, City Engineer
Gary Sund, Utilities Engineer
Maureen Meehan, Storm Water Coordinator

MCM